



## **DEPARTMENT OF LABOR**

### **Employment and Training Administration**

#### **20 CFR Part 655**

#### **RIN 1205-AB61**

### **Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program; Delay of Effective Date; Impact on Prevailing Wage Determinations**

**AGENCY:** Employment and Training Administration, Wage and Hour Division.

**ACTION:** Guidance.

**SUMMARY:** The Department of Labor (we or the Department), as a result of Congressional appropriations language, recently delayed the effective date of the Wage Methodology for Temporary Non-agricultural Employment H-2B Program Final Rule (the Wage Rule) to January 1, 2012. This Notice provides additional guidance to those employers who have received from the Department either a supplemental or dual prevailing wage determinations based on a previous effective date of the new prevailing wage methodology. This guidance provides additional clarification regarding the wage payment requirements for employers participating in the H-2B Temporary Non-agricultural program.

**DATES:** This guidance is effective [insert date of publication].

### **FOR FURTHER INFORMATION CONTACT:**

William L. Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210; Telephone (202) 693-3010 (this is not a toll-free number). For further information concerning the Wage and Hour Division, contact Mary Ziegler, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-3510, Washington, DC 20210; Telephone (202) 693-0071 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY calling the toll-free Federal Information Relay Service as 1-877-889-5627 (TTY/TDD).

#### **SUPPLEMENTARY INFORMATION:**

The Department published the Wage Rule on January 19, 2011, 76 FR 3452. The Wage Rule revised the methodology by which we calculate the prevailing wage to be paid to H-2B workers and United States (U.S.) workers recruited in connection with a temporary labor certification used in petitioning the Department of Homeland Security to employ a nonimmigrant worker in H-2B status. We originally set the effective date of the Wage Rule for January 1, 2012. However, as a result of a court ruling that invalidated the January 1, 2012 effective date of the Wage Rule,<sup>1</sup> we issued a Notice of Proposed Rulemaking (NPRM) on June 28, 2011, proposing that the Wage Rule take effect 60 days from the date of publication of a final rule resulting from the NPRM. 76 FR 37686, Jun. 28, 2011. We published a Final Rule on August 1, 2011, which set the new effective date of September 30, 2011 for the Wage Rule (the Effective Date Rule).

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<sup>1</sup> CATA v. Solis, Civil Docket No. 09-240, Doc. No. 119, 2011 WL 2414555 (E.D. Pa. June 16, 2011).

In anticipation of the revised effective date of the Wage Rule, the Department issued supplemental prevailing wage determinations to those employers granted labor certification for an H-2B application where work would be performed on or after September 30, 2011. Those supplemental determinations were provided to employers to enable them to meet their amended wage obligations.

Both the Wage Rule and the Effective Date Rule were challenged in two separate lawsuits<sup>2</sup> seeking to bar their implementation. In consideration of the two pending challenges to the Wage Rule and its new effective date, and the possibility that the litigation could be transferred to another court,<sup>3</sup> the Department issued a final rule, 76 FR 59896, Sep. 28, 2011, postponing the effective date of the rule from September 30, 2011, until November 30, 2011, in accordance with the Administrative Procedure Act, 5 U.S.C. 705.

Following the postponement of the effective date to November 30, 2011, and in anticipation of the new effective date, the Office of Foreign Labor Certification (OFLC) issued participating employers two simultaneous (or dual) wage determinations for work to be potentially performed before and after the new effective date of the Wage Rule. The first determination was based on the former regulations that applied until November 30, and the second determination was based on the new prevailing wage methodology set

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<sup>2</sup> See Louisiana Forestry Association, Inc., et al (LFA) v. Solis, et al, Civil Docket No. 11-1623 (WD LA, Alexandria Division); and Bayou Lawn & Landscape Services, et al (Bayou) v. Solis, et al, Civil Docket No. 11-445 (ND FL, Pensacola Division).

<sup>3</sup> On December 12, 2011, the LFA court granted a motion to transfer venue over the litigation to the Eastern District of Pennsylvania, the court in which the CATA case remains pending. However, the Bayou court denied the defendant's motion to transfer the Bayou litigation to the Eastern District of Pennsylvania the same day.

forth in the Wage Rule, that was to be effective for work performed on and after November 30, 2011.

On November 18, 2011, the President signed into law the Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. 112-55, Div. B, Title V, § 546 (Nov. 18, 2011)(the November Appropriations Act). The November Appropriations Act contains language preventing the expenditure of funds to implement, administer, or enforce the Wage Rule prior to January 1, 2012. Accordingly, the Department issued a final rule in the Federal Register, 76 FR 73508 (Nov. 29, 2011), again postponing the effective date of the rule, this time from November 30, 2011, until January 1, 2012. As a result, the Department issued in the first half of December 2011 prevailing wage determinations, with the advisory that additional determinations would be forthcoming.

On December 23, 2011, the President signed into law the Consolidated Appropriations Act, 2012, which provides that “[n]one of the amounts made available under this Act may be used to implement the [Wage Rule].” Because of the distinct possibility that we would be unable to operate the H-2B program for the remainder of FY 2012 if the effective date of the Wage Rule were not postponed, the Department determined that this situation constituted an emergency warranting the publication of a final rule under the good cause exception of the Administrative Procedure Act to delay the effective date of the Wage Rule to October 1, 2012. Consequently, the Department is publishing a final rule to extend the effective date of the Wage Final Rule to October 1, 2012. See the final rule delaying the effective date of the H-2B Wage Rule, published elsewhere in this issue of the Federal Register.

In light of the postponement of the effective date of the Wage Rule until October 1, 2012, the Department is hereby providing public notice that the wage determinations previously issued in anticipation of the effective date of, and in accordance with, the Wage Rule will not be effective until October 1, 2012, and will then apply only to work performed on or after that date, if applicable. In addition, we are hereby providing notice that those prevailing wage determinations issued under the Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes; Final Rule, 73 FR 78020, Dec. 19, 2008 (the 2008 H-2B Rule), which were listed as valid until either November 30, 2011 or December 31, 2011, are now valid for a period of 90 days beyond December 31, 2011, i.e. until March 30, 2012, and only apply to work performed on or before September 30, 2012.

Any employer who received an H-2B prevailing wage determination issued in anticipation of the September 30, 2011, November 30, 2011, or January 1, 2012 effective dates of the Wage Rule is not required to pay, and the Department's Wage and Hour Division will not enforce, the wage provided in those prevailing wage determinations issued in anticipation of the effective date of the Wage Rule for any work performed by H-2B workers or U.S. workers recruited in connection with the H-2B application process until October 1, 2012. Employers are expected to continue to pay at least the prevailing wage as provided in a prevailing wage determination issued under the 2008 H-2B Rule for any work performed before October 1, 2012. Further, employers who received a supplemental H-2B prevailing wage determination, or a prevailing wage determination issued in anticipation of the effective date of the Wage Rule, who are still employing H-

2B workers employed under labor certifications issued in connection with those prevailing wage determinations, must pay at least the wage issued under the Wage Rule to any H-2B worker and any U.S. worker recruited in connection with the labor certification for work performed on or after October 1, 2012.

The Department is providing notice that, as a result of the December Appropriations Act, it is precluded from addressing issues raised in Center Director Review requests submitted by employers in connection with prevailing wage determinations issued in anticipation of the effective date of, and in accordance with, the Wage Rule.

Last, the Department in anticipation of questions from the filing community and as a measure of customer service has established the following e-mail box for questions:

[H2Bwagerule@dol.gov](mailto:H2Bwagerule@dol.gov).

Signed at Washington, D.C. this 23rd of December, 2011.

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Jane Oates  
Assistant Secretary for Employment and Training

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Nancy Leppink  
Deputy Administrator, Wage and Hour Division

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